However, it is to be noted that the critical comments here made go rather to the general desirability of a revised analysis of the law of property and the adoption of a more exact terminology that will make possible the more accurate statement of its rules and principles, than to the relative merits of Mr. Tiffany's excellent treatise. His analysis has the merit of being in accord, for the most part, with familiar usage, and in using confusedly terms of uncertain meaning, he is speaking the language of the great masters of the literature of the law of property, and of the courts. Despite minor criticisms that might be made, we may say of this work that in the balanced completeness of its treatment of a vast subject, in its critical and discriminating use of authorities, and in the simplicity and clearness of its style, it stands out as a notable achievement of sound scholarship, one of the very few great American lawbooks.

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The Constitution and What it Means Today. By Edward S. Corwin. Princeton, Princeton University Press, 1920. pp. xxiv, 114.

This little handbook is meant to explain to the non-technical reader the actual meaning of the United States Constitution today. That this cannot really be done in so small a compass, even for the purpose of a layman, is tolerably clear, and much less can or does the book carry out the liberal promise on its cover page . . . "with full explanations of all passages which seem the least obscure." Perhaps Professor Corwin has done as well as anyone could in the same number of words. Some of his brief commentaries are excellent, though there is also a considerable number of inaccuracies and infelicities of statement. It might be thought that a discussion for laymen would be more readily comprehended if related parts of the Constitution were considered together, instead of all clauses being taken up in the order in which they occur in the instrument. Perhaps the gain in ease of reference offsets this, however.

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The Law of Contracts, Volumes II, III and IV. By Samuel Williston. New York, Baker, Voorhis & Co., 1920. Vol. II, pp. xxi, 1157-2329; Vol. III, pp. xxii, 2331-3456; Vol. IV, 3457-4182.

The first volume of this set has already been reviewed at length. See (1920) 29 YALE LAW JOURNAL, 942. Volume II deals with "Performance of Contracts," including Interpretation, Construction, and Express and Implied Conditions; and also with "Particular Classes of Contracts," including Sales, Service, Bailments, Carriers, Negotiable Instruments, and Suretyship. Volume III deals with "Remedies for Breach of Contract;" Fraud, Duress, Mistake, and Illegality; and "Discharge of Contracts." Volume IV contains only the index and table of cases.

No doubt the author does not purport to deal with every phase of such particular classes of contracts as Sales, Carriers, and Negotiable Instruments. However, he cannot avoid treating them to some extent; because the law of contracts is but the complex aggregate of the law of the particular classes. The Negotiable Instruments Law is printed in full with rather meagre comment. The chapters on Suretyship are most excellent, and form the best existing text to go with Ames' *Cases on Suretyship.*

Those who are familiar with Williston's *Cases on Contracts* know the extent to which he improved upon Langdell in dealing with the subject of Construction

and Performance of Contracts. No other writer has equalled Professor Williston's treatment of that subject in the present treatise. The most difficult questions of contract law that confront the lawyer to-day are in this field. He should not fail to go to this text for its discussion of conditions express and implied, precedent and subsequent. When are promises mutually dependent? What are the doctrines of "substantial" performance? What is the "essence" of a contract and when is performance on time of the essence? What are the rules applicable to instalment contracts? These questions are exhaustively answered.

Along with such thorough approval of the entire work, however, one may perhaps be permitted to express a few differences of opinion. In section 663 it is said: "A condition in a promise limits the undertaking of the promisor to perform, either by confining the undertaking to the case where the condition happens or to the case where it does not happen." Here is a double use of the term "condition;" for how can a condition be "in a promise" if it has not happened or if it never happens? In the promissory expression there are words that cause the subsequent event to operate as a condition. It is the event that is the condition.

In section 665 the author very properly distinguishes between a promise and a condition. Is it not doubtful, therefore, whether he should use such a phrase as "*breach* of a condition" or should speak of an "*excuse* for the non-performance of a condition?" One would like a little clearer explanation of how conditions "qualify not the existence of the contract but the liability under it." How does a contract "exist," what is "liability," and how can either of them be "qualified."

Is it not merely confusing to suggest, as in section 809, of a condition subsequent: "Such a condition, however, though a true condition subsequent so far as concerns a right of action on the promise may, it seems, be made by the contract a condition precedent of a particular suit?" The author suggests that the parties may provide "that it is a necessary prerequisite of any action which may be brought that it shall be brought within a given time." But how can the bringing of a suit be a prerequisite to itself? The action is always brought for the vindication of a pre-existing right. The right, therefore, is a prerequisite to a just judgment for the plaintiff. The suit should fail if any condition precedent to the right has not occurred or if any condition subsequent to the right has occurred to extinguish it. It is the *right,* not the suit, that depends upon the conditions, precedent or subsequent.

Why does the author insist, as in section 840, that a sealed instrument (or a negotiable instrument) and a separate written promise given in return must necessarily be "separate contracts?" Our courts have long held, with Professor Williston's approval, that such separate promises may be mutually dependent and that the duty of each party may be conditional upon a performance by the other. Nevertheless he writes that "The impossibility of suing at common law on such a hybrid either in covenant or assumpsit is of itself enough to prove" that there are two separate contracts. It is submitted that this is error. The two forms of action mentioned have long been buried, as Maitland has said; and in this instance they no longer rule us from their graves. The ancient forms of action were indeed inadequate to do justice according to the modern notions of what justice is. That is why we have buried them. The "civil action" under our codes of to-day does not isolate some one fact, such as a seal, and give it a legal operation to the neglect of other facts. Nor are there now two sets of courts that will do conflicting and inconsistent things on the same facts. To-day neither of the separate instruments can properly be called " a contract." And the legal relations between the parties cannot be determined by considering either instrument alone. If by "contract" we mean the operative facts, we must include

some of the physical acts of both parties and both paper documents. If we mean the legal relations created by the facts, we mean the single set of legal relations that are determined and created by all the existing facts. If we mean the "promise or set of promises," we must include the two promises as made. For the "hybrid" contract we now have a "hybrid" action in a "hybrid" court. That the parents belonged to different species does not prevent the hybrid progeny from having a single individuality of its own, with perhaps the good qualities of each parent and the bad qualities of neither.

The accuracy of the foregoing does not in the least depend upon rules as to burden of proof or burden of allegation or burden of going forward with evidence. True legal relations are not determined by those rules.

In section 632, dealing with the parol evidence rule [and quoting Wigmore, *Evidence* (1905) sec. 2401], it would be an improvement to follow Austin, Holmes, and Markby in their definition of the word "act." Reasonable objection can be made to the following: the "creation of an act;" "a legal act consisting of a promise or set of promises;" "the written memorial . . . is, for legal purposes, the sole act of the parties."

Any reviewer can find specific flaws in any book. There is no one, however, who is better prepared to write a complete work on the law of contracts than Professor Williston; and there is no one who has as yet written so sound and scholarly a treatise. Student, lawyer, or judge will alike be in serious error unless he makes thoroughly his own the reasoning and system of Professor Williston and uses them as the basis for further advance.

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Collected Legal Papers. By Oliver Wendell Holmes. New York, Harcourt, Brace & Howe, 1920. pp. vii, 316.

The thanks of the legal profession are due to Mr. Harold J. Laski for gathering together in one volume these papers by Mr. Justice Holmes, for they contain, even more than the learned author's work on *The Common Law,* an important message which has not as yet been brought to the attention of the average lawyer or judge. Scattered through the pages of the legal magazines, they have been buried away where only few members of the bench and bar ever saw them and so have failed to have their full effect upon legal thinking.

In the three essays entitled "Privilege, Malice, and Intent" (1894), "The Path of the Law" (1897) and "Law in Science and Science in Law" (1899) are presented the fundamentals of Mr. Justice Holmes's methods of thought. To "become a master" of the law, we are there told,

"means to look straight through all the dramatic incidents and to discern the true basis for prophecy."[1]

"The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discern from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reason why those ends are desired, what is given up to gain them, and whether they are worth the price."[2]

In his tribute to the learned author in the March number of the Harvard Law Review for the current year, Dean Pound suggests that these methods and ideas are characteristic of the legal thinking of the present. So far as a relatively small number of legal scholars are concerned this is perhaps true, but it is

[1] "The Path of the Law," 196.

[2] *Id.* 198.